A Statutory Bill of Rights for Australia? Lessons from the United Kingdom

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I. Introduction

Constitutional and public law reform in Australia is in the doldrums. There has not been a successful federal referendum since 1977 and in that time little other structural change to our system of government. By contrast, the United Kingdom is undergoing far-reaching reforms. A federal structure has emerged and new Parliaments have been created in Scotland, Wales and Northern Ireland, each with 'devolved' powers from the Parliament of the United Kingdom. The United Kingdom now also has a Bill of Rights. That the United Kingdom, with an unwritten constitution heavily influenced by notions of parliamentary sovereignty, has implemented the Human Rights Act 1998 (UK) ('the HRA') is a constitutional achievement. That Act enables recourse to domestic courts in the enforcement of the rights spelt out in the European Convention on Human Rights and Fundamental Freedoms ('the ECHR'). It also formalises a fundamental modification of the traditional demarcation of power between the judiciary and legislature in that country.

The HRA is of particular relevance to Australia. Australia has clung to traditional notions of responsible government and parliamentary sovereignty, in part because they continued to be applied faithfully in the United Kingdom. Today, however, Australia is the only common law nation in which such traditional conceptions are applied without a Bill of Rights. As Chief Justice Spigelman of the New South Wales Supreme Court has warned, the Australian tradition of common law protection of basic rights is now 'threatened with a degree of intellectual isolation that many would find disturbing'.[1] No other western common law nation has retained such concepts without subjecting their expression to the protection provided by the entrenchment of fundamental rights in a higher order constitutional or statutory instrument. At the very least, this suggests that we should re-examine our system and question whether reform is necessary. Perhaps it is time for change.

The focus of this article is the shift in the relationship between courts and Parliament in the United Kingdom brought about by the HRA. We analyse the mechanisms employed by that Act in balancing parliamentary sovereignty against the new powers given to judges. Of course, we recognise that parliamentary sovereignty is a contested concept that is itself the subject of significant debate and much literature. We do not seek to enter into that debate, but proceed from an orthodox understanding of parliamentary sovereignty in analysing the HRA.

Our analysis of the HRA within a framework of parliamentary sovereignty leads us to conclude that the dominant assumptions in Australia about the potential judicialisation of democracy and the abdication of important policy-making decisions by legislatures need to be reassessed. If the United Kingdom model were applied in Australia, an Australian

1 Spigelman JJ, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141 at 150.

Bill of Rights would not result in the significant judicialisation of democracy that some have speculated. Indeed, a Bill of Rights may redress the inadequacies of the Australian common law in the protection of fundamental human rights. Such inadequacies are becoming increasingly evident with the ease with which Parliament is able to abrogate basic rights and is also reflected in the fact that Australians are increasingly looking for protection not from domestic courts but from international institutions and treaties.

II. The road to the *Human Rights Act 1998* (UK)

On 4 November 1950, the Council of Europe signed the ECHR. That Convention was developed in part as a reaction to the atrocities of the World War Two. However, it has also been said that 'its authors were not only looking over their shoulders at the tyranny of Nazism; they were looking at a Europe in which strong pro-Soviet Communist parties were bidding for power'.[2] The ECHR was based upon the Universal Declaration on Human Rights, which was signed in 1948 and entered into force in 1953.

When the United Kingdom ratified the ECHR in 1951 a conscious decision was made not to incorporate the Convention into domestic law. It was feared that 'doing so would compromise the sovereignty of Parliament and would subject the common law to supervision by judges from an alien legal tradition'.[3] Nevertheless, in 1966 the right of individual petition was introduced, a procedure that continues to enable United Kingdom citizens to allege violations of their Convention rights by their government at the European Court of Human Rights in Strasbourg. In determining such cases the approach of the European Court of Human Rights is to afford a 'margin of appreciation' to domestic laws.[4] That is, the Court acknowledges the importance of the sovereignty of a state, the underlying policy of states on certain legislative issues and the capacity of the domestic legal system to adequately cater for remedial action. Hence, 'where state intervention is expressly required specific remedial outcomes are not prescribed but left to the discretion of the individual state'.[5]

Three major forces pressed for the incorporation of the ECHR into United Kingdom law. First, advocacy for incorporation continued intermittently over the three to four decades following promulgation of the ECHR, with the issue taking on new significance after strong criticism of the accountability and human rights record of the Conservative governments of the 1980s and 1990s.[6] Second, the United Kingdom had accumulated a poor record at the European Court of Human Rights. There were a 'myriad of lengthy legal campaigns leading to United Kingdom governments defeats in Strasbourg',[7] yet there was a 'complacent view' in the wider community that 'British law already fully complied with the Convention'.[8] The United Kingdom was second only to Italy in the number of violations of the Convention, with around 50 decisions in which the European Court on

2 Sedley S, 'A Bill of Rights for the UK: From London to Strasbourg by the Northwest Passage?' (1998) 36 *Osgoode Hall Law Journal* 63 at 67.

3 Greer S, 'A Guide to the Human Rights Act 1998' (1999) 24 *European Law Review* 3 at 4.

4 See Livingstone S et al, *Civil Liberties Law: The Human Rights Act Era*, Butterworths, London, 2001 at 21; Greer S, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Human Rights files No 17), Council of Europe, 2000; Yourow H, *The Margin of Appreciation Doctrine in the Dynamics of the European Court of Human Rights Jurisprudence*, Martinus Nijhoff, The Hague, 1996.

5 Livingstone S et al, note 4 at 37.

6 See, for example, discussion of the 'autocratic temperament of the Conservative governments of the 1980's and 1990's' in Greer S, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* at 4. See also Travis A & Dyer C, 'Power Shifts to the Judges', *The Guardian* (London), September 11, 2000 at 6 ('One major factor in Labour's conversion to the act was the "elective dictatorship" under Margaret Thatcher').

7 Livingstone S et al, note 4 at 45.

8 Note 3 at 5.

Human Rights had found the United Kingdom to have violated Convention rights.[9] Third, there was alarm at the increasing isolation of the United Kingdom (or at least isolation along with Australia) in the common law world. Canada, for example, had constitutionally entrenched the Canadian Charter of Rights and Freedoms in 1982, while New Zealand has adopted the *New Zealand Bill of Rights Act 1990* (NZ).

These factors led to the 'dawning realisation that under the Westminster system a government could easily interfere with rights and values' and a growing commitment to the ideal that there was 'no task more central to the purpose of a modern democracy than that of seeking to protect within the law, basic human rights of the citizen against invasion by other citizens or by the state itself'.[10] When a new Labour government was elected in a landslide victory in May 1997, it was with an enthusiasm for incorporation of the ECHR and a desire to embrace the 'constitutional moment' (that is, one of those 'fleeting junctures of opportunity for radical redesign of a polity'[11]). The HRA symbolised one tenet of a broader Labour agenda to 'modernise our society and refresh our democracy' (including, as part of the larger plan, devolution of power to Parliaments in Scotland and Wales).[12]

Prior to its election, the Labour Party released in December 1996 a paper advocating the incorporation of the ECHR.[13] The paper was the foundation of New Labour's election manifesto, which pledged:

> Citizens should have statutory rights to enforce their Human Rights in the United Kingdom courts. We will by statute incorporate the European Convention on Human Rights into United Kingdom law to bring these rights home and allow our people access to them in their national courts.[14]

Following its 1997 victory, the new Labour Government released a White Paper in which it argued that it was no longer sufficient to rely on the common law for the protection of rights and that incorporation of the European Convention into domestic law was therefore necessary.[15] The Paper argued that the United Kingdom law should empower individuals to argue their Convention rights in domestic courts (hence the title of the White Paper 'Rights Brought Home') and that the law should provide the United Kingdom judiciary with the opportunity to adjudicate on those rights. This would alleviate the burden upon citizens, whose only other option was to use the right of petition to the ECHR (which involved 'slow and expensive proceedings in Strasbourg'[16]). Incorporation would also eliminate the impact adverse decisions were having on the United Kingdom's public image in Europe.[17] Moreover, the ECHR process meant that rights were being determined by 'judges coming from many countries, large and small, who, whatever their merits do not command the same confidence in British eyes as do judges of our own courts'.[18] Such arguments were made in a context where the United Kingdom community was already to some degree familiar with Convention rights and was accustomed to individuals having recourse to the ECHR.

9 Note 3 at 5.
10 Livingstone S et al, note 4 at 45.
11 Macormack N, 'Democracy, Subsidiarity, and Citizenship in the European Commonwealth' (1997) 16 *Law & Philosophy* 331 at 333.
12 Mr Jack Straw, United Kingdom, House of Commons, *Parliamentary Debates*, 16 February 1998 at 782.
13 Straw J & Boateng P, *Bringing Rights Home*, London, Labour Party, 1996.
14 Labour Party, *New Labour: Because Britain Deserves Better*, London, Labour Party, 1997.
15 United Kingdom Home Department, *Rights Brought Home: The Human Rights Bill*, Cm 3782, London, UK Home Department, October 1997.
16 Wade W, 'Opinion: Human Rights and the Judiciary' [1998] *European Human Rights Law Review* 520 at 521.
17 Note 16.
18 Note 16.

The HRA was passed by the United Kingdom Parliament on 9 November 1998.[19] It came into force with regard to laws passed by the new Parliaments in Scotland on 1 May 1999 and Wales on 1 July 1999. The HRA did not apply to laws passed by the United Kingdom Parliament until 2 October 2000. One reason for the period before full implementation of the Act was to ensure adequate training of members of the judiciary. Public authorities were also trained and given time to review their rules and procedures for compliance with the HRA.

III. Convention rights and litigation under the *Human Rights Act 1998* (UK)

The long title of the HRA is to 'give further effect to the rights and freedoms guaranteed under the European Convention on Human Rights'. The rights protected are those contained in the ECHR.[20] They include: the right to life;[21] the right not to be subjected to torture or inhuman or degrading treatment;[22] the right not to be held in slavery or servitude or to be required to perform forced or compulsory labour;[23] the right to liberty and security of person;[24] the right to a fair trial;[25] the right not to be punished without the law;[26] the right to respect for privacy and family life;[27] freedom of expression;[28] the prohibition on discrimination[29] and freedom of thought, religion and conscience.[30]

The test for standing under the HRA is the same test used for proceedings brought against the United Kingdom under the ECHR. Proceedings can only be initiated against a public authority. Section 6(3) states:

> In this section 'public authority' includes—
> (a) a court or tribunal, and
> (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

This definition includes courts and tribunals, public prosecutors, public bodies, police, prisons and immigration officers, local authorities, government departments and any person exercising a public function including private companies. It does not include the United Kingdom Parliament. Jack Straw, Home Secretary at the time of the enactment of the HRA, in dealing with the grey areas produced by the definition of what constitutes a public authority, stated that any test must 'relate to the substance and nature of the act, or to the form and legal personality of the institution'.[31] In explaining how the definition might apply to private companies carrying out public functions, Lord Irvine, the Lord Chancellor, stated that 'a private security company would be exercising public functions in relation to the management of a contracted-out prison but would be acting privately when, for example, guarding commercial premises.'[32]

19 The Act received an unopposed Third Reading in the House of Commons on 21 October 1998 and was given Royal Assent on 9 November 1998. Section 19 of the Act, requiring the Minister in charge of a Bill to make a statement about its compatibility with the Convention rights, came into force on 24 November 1998.
20 Articles 2–12 and 14 of ECHR and Articles 1–3 of 1st Protocol and Articles 1–2 of 6th Protocol as read with Articles 16 to 18 of the Convention.
21 Article 2.
22 Article 3.
23 Article 4.
24 Article 5.
25 Article 6.
26 Article 7.
27 Article 8.
28 Article 10.
29 Article 14.
30 Article 9.
31 United Kingdom, House of Commons, *Parliamentary Debates*, 17 June 1998 at 433.
32 United Kingdom, House of Lords, *Parliamentary Debates*, 24 November 1997 at 811.

To initiate proceedings under the HRA the following test must be satisfied under section 7:

> (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.

Hence, to bring an action under the HRA an individual must be a victim or a potential victim. Public interest groups may only bring direct actions if they satisfy this victim test. It was said that the restricted standing test was to prevent 'interest groups . . . (venturing) into frolics of their own in the courts'.[33] The limited standing rules were clearly designed to counter perceptions that the HRA would lead to a significant expansion in litigation.

Empirical evidence suggests that new cases brought under the HRA have not contributed to a dramatic increase in overall litigation or to the creation of a 'litigation culture' in the enforcement of Convention rights.[34] In its Third Report, the Human Rights Unit of the Lord Chancellors Department monitored the operation of the HRA in the courts over April to June quarter of 2001.[35] In the Court of Appeal (Criminal Division), where it might be expected that there would be considerable HRA activity, of the 1971 cases in that quarter only 6.2% (123) included human rights points. This can be compared with 11.1% (277) of the 2491 cases heard in the October–December period immediately after implementation of the HRA and 8.6% (161) of the 1872 cases heard over January to March 2001. In the High Court, the Queens Bench Division heard only 8 cases citing human rights issues between 2 April and 2 July 2001, the Chancery heard 18 cases over the same period and in the Family Division only one such case was heard. While the number of cases in the Administrative Court fell from 1264 between January and March to 1078 between April and June 2001, 24% (261) of the cases raised human rights issues. The Lord Chancellors Department found that the vast majority of these cases would have been lodged irrespective of the Act. In the Crown Court less than 0.5% of cases involved human rights issues in the nine months since 2 October 2000 and in the quarter April to June 2001, less than 0.01% of County cases involved any question of human rights law. The report found generally that human rights issues were being raised as additional points in cases that would have been lodged even if the Act had not been in force, and hence that the HRA was not generating significant new litigation. It may be that these statistics are too early to reflect any permanent trends resulting from the impact of the HRA. Nevertheless, they do suggest a measured use of the HRA and refute any claims that the HRA would soon lead to excessive litigation.

The Human Rights Act 1998 (UK) *and parliamentary sovereignty*

The White Paper anticipated concerns resulting from empowering the judiciary with a new role of adjudicating upon basic rights. Much of the controversy stemmed from understandings of parliamentary sovereignty. Parliamentary sovereignty is a contested and malleable concept. Nevertheless, it 'has long been regarded as the most fundamental element of the British constitution'.[36] The challenge for the drafters of the HRA was to

33 Mike O'Brien, United Kingdom, House of Commons, *Parliamentary Debates*, 24 June 1998 at 1086.

34 McIntosh D, 'The Liberty of the Subject: Can we rely on the Common Law?' paper presented to the 32nd Australian Legal Convention, Canberra, 13 October, 2001 at 9 <www.lawcouncil.asn.au/release.html?year=2001&oid=1966589971>.

35 Lord Chancellors Department, Human Rights Unit, HRA 1998: *A Statistical Update*, Lord Chancellors Department, London, November, 2001 <www.humanrights.gov.uk/hrimpact3.htm>.

36 Goldsworthy J, *The Sovereignty of Parliament: History and Philosophy*, Clarendon Press, Oxford, 1999 at 1.

bring about a new regime of rights protection that would not disturb long held balances and accommodations between Parliament and the courts.

In its orthodox form, parliamentary sovereignty can be viewed in both a strong and a weak form. In its strong form, the concept suggests that the actions of Parliament cannot be challenged in any other forum and that the power of Parliament to make law is unconstrained. The weaker form suggests that Parliament is sovereign within carefully constructed boundaries. Hence, Parliament possesses a plenary lawmaking power but only so long as this power is exercised within its proper limits and according to its proper form.

The writings of A V Dicey have been especially influential in understanding the strong form of the concept. Dicey viewed parliamentary sovereignty in the United Kingdom as 'the dominant characteristic of our political institutions'[37] and 'the very keystone of the law of the constitution'.[38] Moreover, he argued that the common law, within a framework of parliamentary sovereignty and the rule of law, is the best protector of human rights.[39] Dicey viewed parliamentary sovereignty as the notion that Parliament has the right to make or unmake law and that no person or body is recognized by the law as having the right to override or set aside law.[40] His theoretical approach meant that no Parliament has the power to bind its successors, as that would restrict the legislative power of a future sovereign Parliament.[41] Parliament has in effect 'omnipotence or undisputed supremacy throughout the whole country'.[42] Under this strong form of parliamentary sovereignty, 'it is the responsibility of the judges to declare what the law is, but in doing so, they are bound to accept every Act of Parliament as valid law'[43] and courts 'can change the common law, but it is subordinate to statute law, their decisions are always liable to be overturned by Parliament.'[44]

The influence of Dicey's scholarship has extended beyond the United Kingdom to other common law nations such as Australia. This explains in part Australian reluctance to bring about a Bill of Rights and the steadfast adherence to the common law as the appropriate protector of rights. Yet, even before the enactment of the HRA, questions were being raised in the United Kingdom about the continuing relevance of any adherence to the strong form of parliamentary sovereignty. While proponents of parliamentary sovereignty asserted that it underpinned the British common law tradition, its critics questioned the entire legitimacy of its conception. For example, it was argued that parliamentary sovereignty was merely a 'recent invention' of lawyers like 'Blackstone, John Austin and Dicey influenced by a tradition of legal positivism founded by Thomas Hobbes'.[45]

This strong form of parliamentary sovereignty exists as an absolute version of the concept. However, the concept arguably does not exist in this form in practice. Weaker forms of parliamentary sovereignty recognise that Parliament can only be seen as sovereign within certain limits. Hence, the notion that Parliament must obey its own rules of law-making, such as that a Bill only becomes law after it is passed with majority support and receives the Royal Assent. Of course, Parliament is capable of changing these rules of law-making, but must nevertheless comply with them until it does so or in changing the rules. In the meantime, as Dixon J noted cryptically in *Attorney-General (NSW) v*

37 Dicey AV, *An Introduction to the Study of the Law of the Constitution*, 10th ed., Macmillan, London; St. Martin's Press, New York, 1962 at 39.
38 Ibid at 70.
39 Patmore G & Thwaites A, 'Fundamental Doctrines for the Protection of Civil Liberties in the UK: A V Dicey and the *Human Rights Act* 1998 (UK)' (2002) 13 *Public Law Review* 52 at 55.
40 Note 37 at 37.
41 Note 37 at 64–65.
42 Note 37 at 183.
43 Note 36 at 4.
44 Note 36 at 4.
45 Note 37 at 4.

Trethowan,[46] a court 'might be called upon to consider whether the supreme legislative power in respect of the matter had in truth been exercised in the manner required for its authentic expression and by the elements in which it had come to reside'. A similar concept is echoed in the decisions of the *Supreme Court of South Africa in Harris v Minister of the Interior*[47] and the Privy Council on appeal from Ceylon, now Sri Lanka, in *Bribery Commissioner v Ranasinghe*.[48] It was stated in the latter case:

> a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign . . . the proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process.[49]

There have also been theoretical challenges to the strong, or absolute conception of parliamentary sovereignty. Trevor Allan has argued that 'Parliament is sovereign because the judges acknowledge its legal and political supremacy' and that 'legislation obtains its force from the doctrine of parliamentary sovereignty, which is itself a creature of the common law and whose detailed content and limits are therefore matters of judicial law-making'.[50] He has seen the common law as a constitutional framework that is 'self-evidently adaptable to new insights and fresh demands' and 'must be developed with imagination to meet the needs of a modern constitutionalism'.[51] Similarly, Sir Stephen Sedley has said that parliamentary sovereignty has been replaced by 'a new and still emerging constitutional paradigm' and noted the bipolar nature of 'sovereignty of the Crown in Parliament and the Crown in its courts'.[52] Even members of the judiciary have questioned assumptions about the sovereignty of Parliament. Lord Woolf has stated that 'if Parliament did the unthinkable, then I would say that the courts would . . . be required to act in a manner which would be without precedent [because] ultimately there are even limits on the supremacy of Parliament which is the courts' inalienable responsibility to identify and uphold'.[53]

Such reasoning suggests that the HRA should be assessed not against Dicey's strong view of parliamentary sovereignty, but against a weaker form of parliamentary sovereignty in which Parliaments are not omnipotent but are subject to certain rules and limits. In such a context, the HRA is not significant because it is inconsistent with parliamentary sovereignty, but because it further qualifies the weak form of the concept. Hence, the HRA does not mean that the United Kingdom Parliament is no longer sovereign. Parliamentary sovereignty remains in effect in its weak form.

In any event, the reality was that prior to the enactment of the HRA the United Kingdom Parliament had also seen an external limitation emerge to its sovereignty. Citizens were already entitled since 1966 to enforce their rights under European law with the right of individual petition at the European Court on Human Rights. Prior to the HRA, such petitions had led to numerous changes to United Kingdom law.[54] In practice then, this had

46 (1931) 44 CLR 395 at 426.
47 [1952] 2 SALR 428.
48 [1965] AC 172.
49 Note 48 at 197–198.
50 Allan T, Law, *Liberty and Justice The Legal Foundations of British Constitutionalism*, Clarendon Press, Oxford, 1993 at 10. Compare Note 37 at 246–272.
51 Note 50.
52 Sedley S, 'Human Rights: A 21st Century Agenda' [1985] *Public Law* 386 at 389.
53 Woolf, 'Droit Public — English Style' [1995] *Public Law* 57 at 69.
54 Wicks E, 'The Impact of the *Human Rights Act* 1998 — An Update from the United Kingdom' (2001) 12 *Public Law Review* at 167.

called 'into question Dicey's theory of traditional English methods of protecting fundamental freedoms'. The enactment of the HRA merely amounted to a further challenge to the fundamental assumptions and 'efficacy' of Dicey's tradition of parliamentary sovereignty in its strong form.[55]

IV. The *Human Rights Act 1998* (UK) and mechanisms to preserve parliamentary sovereignty

A central concern of the drafters of the HRA was that it should not enable courts to strike down or set aside legislation. In other words, the HRA was not to confer a power of judicial review.[56] Hence, s 3 of the HRA provides for an interpretive obligation of a court to read and give effect to legislation in a way that is consistent with Convention rights in so as far as it is possible to do so. If a court is in a position where it is impossible to read and give effect to legislation in this way, it then may issue a declaration of incompatibility under section 4. Section 10 empowers a Minister to amend legislation via a remedial action made in response to such a declaration. Section 19 is also significant in imposing an obligation on a Minister in charge of a Bill to state whether the Bill is compatible with Convention rights.

These provisions protect fundamental freedoms within a modified legislative and judicial environment that also safeguards parliamentary sovereignty. Regarding any judicial capacity to invalidate legislation, the White Paper reiterated that there was 'no evidence to suggest that [judges] . . . desire this power, nor that the public wish them to have it'.[57] Rather than providing for an incursion upon parliamentary sovereignty, the Labour Government viewed the Human Rights Bill as an 'instrument of balance between two legal traditions — first, judicial review grounded in the Convention rights and secondly, respect for the sovereignty of Parliament'.[58]

There has been considerable debate as to whether the HRA adequately preserves parliamentary sovereignty. Its introduction has been described as 'constitutional vandalism' and much consternation has been expressed at the creeping losses of the Westminster Parliament.[59] There were widespread concerns that democracy would be 'sullied by the massive transfer of governing power inherent in the HRA model'.[60] Lord Hoffman argued that 'For two centuries we have entrusted our most fundamental liberties to the will of a sovereign Parliament and, taken all in all, Parliament has not betrayed that trust'.[61] Others argued that the HRA derogated from British democracy because 'the European Charter and the HRA represent a juridical and justice-based form of constitutionalism that conflicts . . . with a political and freedom based form of constitutionalism centred on the constitutive activity of citizens'.[62] There are many critics of this view, one argument being that Parliament enjoying unfettered sovereign power is at odds with the necessary constraints upon Parliament demanded by the rule of law. In any event, a careful analysis of the HRA

55 Note 40 at 57. See also *R v Secretary of State for Transport; Ex parte Factortame Ltd [No 1]* [1990] 2 AC 85; *[No 2]* [1991] 1 AC 603.

56 The HRA does, however, enable a court to strike down subordinate legislation in a limited set of circumstances. See HRA, s 3(2)(c).

57 *Rights Brought Home: The Human Rights Bill* Presented to parliament by the Secretary of State for the Home Department, Cm 3782, October, 1997 at 2.13.

58 Livingstone et al, Note 4 at 5.

59 Note 4 at 47.

60 Note 4 at 47.

61 Hoffman, 'Human Rights and the House of Lords' (1999) 62 *Modern Law Review* 159 at 160.

62 Bellamy R, 'Constitutive Citizenship versus Constitution rights: Republican Reflections on the *EU Charter* and the *Human Rights Act*' in Campbell T et al (eds) *Sceptical Essays on Human Rights*, Oxford University Press, New York, 2001, 35.

demonstrates that the Act is consistent with parliamentary sovereignty in its weak, or already bounded form.

1. Interpretive obligation

3(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
(2) This section—
(a) applies to primary legislation and subordinate legislation whenever enacted;
(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Section 3 has been described as a 'radical tool'[63] because pre-HRA judicial interpretation limited the extent to which Convention rights could be employed in domestic law. The judiciary could only employ Convention rights where legislation was ambiguous, in that case to give effect to the presumption that Parliament intends to legislate consistently with international law obligations. The situation is very different under s 3. Courts interpreting legislation must now give effect to such legislation in a way that is consistent with Convention rights even if such a reading would not have be given under a pre-HRA construction. While giving judges greater creative power to derive meaning from legislation, s 3 also maintains Parliamentary sovereignty by not going further in granting courts the power to declare legislation to be invalid for breach of Convention rights.

The interpretive obligation in s 3 was well illustrated in *R v Offen*,[64] where the Court of Appeal dealt with s 2 of the *Crime (Sentences Act) 1997* (UK). Section 2 provided for the imposition of an automatic life sentence (except in defined 'exceptional' circumstances) for a person convicted of a serious offence who had previously been convicted of a serious offence under the Act. The Court of Appeal found that the section did not breach Convention rights as long as the word 'exceptional' could be read widely. The case demonstrated how s 3 of HRA can ensure immediate compliance with the Convention through the interpretive obligation. This can be contrasted with the operation of s 4, discussed below, which may do little more than highlight a problem while failing to granting an effective remedy.

The circumstances in which s 3 can be applied remain in contention. Lord Steyn argued in *R v A*[65] that the interpretive obligation 'applies even if there is no ambiguity in the language' and that it is 'an emphatic adjuration by the legislature . . . that the obligation goes far beyond the rule which enabled the courts to take the Convention into account in resolving any ambiguity in a legislative provision'. Lord Bingham in *Brown v Stott*[66] saw less scope for s 3, stating that the courts will defer to the 'decisions of a representative legislature and a democratic government within the discretionary area of judgement accorded to those bodies'. However, as Murray Hunt has argued, the 'declaration of incompatibility . . . scheme . . . gives [courts] every incentive to discover the interpretive flexibility to avoid granting such declarations. This makes them likely to reach compatible

63 Klug F & Starmer K, 'Incorporation through the "front door": the first year of the Human Rights Act' [2001] *Public Law* 654 at 664. See also *R v A* [2001] 3 All ER 1 at 17 per Lord Steyn ('Section 3 is more radical in its effect').
64 [2001] 2 All ER 154.
65 [2001] 3 All ER 1 at 17.
66 [2001] 2 All ER 97 at 114.

interpretations that they might not otherwise have reached by more traditional interpretive techniques'.[67]

2. *Declaration of Incompatibility*

4(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.
(4) If the court is satisfied—
(a) that the provision is incompatible with a Convention right, and
(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility . . .
(6) A declaration under this section ('a declaration of incompatibility')—
(a) does not affect the validity, continuing operation or enforcement of the provision; and
(b) is not binding on the parties to the proceedings in which it is made.

Section 4 provides a court with a discretionary power to issue a declaration of incompatibility where the court is satisfied that a provision is incompatible with a Convention right. If the court makes such a declaration, it is not binding on the parties and has no effect on the validity or operation of primary legislation. Prior to the issuing of such a declaration, the Crown is afforded the opportunity, under s 5, to take part in the proceedings.

In *R v A*,[68] Lord Steyn referred to the declaration of incompatibility as a 'measure of last resort',[69] and that 'It must be avoided unless it is plainly impossible to do so'.[70] Even though a declaration of incompatibility establishes that a litigant has had their Convention rights infringed, the infringement of such rights does not affect the operation of the offending legislation. There is no remedy unless the Minister issues a remedial order under s 10. As this remedial power is itself discretionary, it further emphasises the limits of judicial power.

The declaration of incompatibility has been described as providing litigants with 'a form of booby prize since the act clearly states that incompatible legislation remains effective and valid'.[71] In discussing the role of the declaration of incompatibility and the importance of the interpretive obligation, Lord Hope in *R v DPP, ex parte Kebilene*[72] said that a declaration must be seen 'principally as an instrument in promoting rather than frustrating the principles and practices of a representative government'. Lord Steyn, when considering the deference that should be accorded to the legislature, reiterated this position by quoting the following passage approvingly:

> Just as there are circumstances in which an international court will recognise that national institutions are better placed to assess the needs of society and to make difficult choices between competing considerations, so national courts will accept that there are some circumstances in which the legislature and the executive are better placed to perform those functions.[73]

67 Hunt M, 'The HRA and Legal Culture: The Judiciary and the Legal Profession' (1999) 26 Journal of Law and Society 86 at 97.
68 Note 65.
69 Note 65 at 17.
70 Note 65 at 17.
71 Leigh I, 'The UK's HRA 1998: An Early Assessment' in Huscroft G & Rishworth P (eds) *Litigating Rights: Perspectives from Domestic and International Law*, 2002 at 324.
72 [2000] 2 AC 326 at 384.
73 *R v A* [2001] 3 All ER 1 at 121 (quoting Lord Lester and David Pannick, *Human Rights Law and Practice*, Butterworths, London, 1999, para 3.21).

R v London North and East Region Mental Health Review Tribunal[74] was one of the first cases in which a court issued a declaration of incompatibility. This case involved the *Mental Health Act 1983* (UK) and the appeals system for prisoners detained on grounds of mental health. While the Court of Appeal emphasised the importance of reading legislation to be compatible with Convention rights, it found that it was not possible to do so in regard to s 73 of the Act. Section 73 established a strict burden on the applicant to prove that he or she no longer suffered from a mental disorder. The Court found that the burden could not be reversed by interpretation and as a result that the provision was incompatible with the right to liberty in Article 5 of the Convention. This left no other option than to issue a declaration of incompatibility.

In *Wilson v First County Trust Ltd [No 2]*[75] the Court of Appeal again granted a declaration of incompatibility. The case concerned s 127(3) of the *Consumer Credit Act 1974* (UK), which imposed a statutory bar upon the enforcement of a security if certain pre-conditions were not met. This was found to conflict with Articles 1 and 6 of the First Protocol to the ECHR, which protect the right to peaceful enjoyment of one's possessions. The Court said in relation to the interpretive obligation in s 3 that 'The court is not required, or entitled, to give to words a meaning which they cannot bear; although it is required to give words a meaning that they can bear, if that will avoid incompatibility, notwithstanding that this is not the meaning which they would give in a "non-Convention" interpretation'.[76]

The declaration of incompatibility mechanism plays a key role in informing Parliament of inconsistencies between its legislation and Convention rights. This process, in denying courts the power to themselves strike down or remake legislation and when combined with the possibility of a remedial order under s 10, acts to preserve parliamentary sovereignty. While Parliament may feel constrained by the HRA, any constraint is political and not legal and the United Kingdom judiciary clearly remains subject to the sovereign will of Parliament.[77]

3. Remedial order

10(1) This section applies if—
- (a) a provision of legislation has been declared under section 4 to be incompatible with a Convention right and, if an appeal lies—
  - (i) all persons who may appeal have stated in writing that they do not intend to do so;
  - (ii) the time for bringing an appeal has expired and no appeal has been brought within that time; or
  - (iii) an appeal brought within that time has been determined or abandoned; or
- (b) it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights made after the coming into force of this section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.

(2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.

(3) If, in the case of subordinate legislation, a Minister of the Crown considers—
- (a) that it is necessary to amend the primary legislation under which the subordinate legislation in question was made, in order to enable the incompatibility to be removed, and
- (b) that there are compelling reasons for proceeding under this section,

74 [2001] 3 WLR 512 (CA).
75 [2001] 3 WLR 42 (CA).
76 Note 75 at 59.
77 Bamforth, N, 'Parliamentary Sovereignty and the Human Rights Act 1998' [1998] *Public Law* 572 at 575.

he may by order make such amendments to the primary legislation as he considers necessary

(4) This section also applies where the provision in question is in subordinate legislation and has been quashed, or declared invalid, by reason of incompatibility with a Convention right and the Minister proposes to proceed under paragraph 2(b) of Schedule 2.

Where a declaration of incompatibility has been issued, s 10 of the HRA provides for the possibility of a remedial order. The section empowers a Minister, if he or she believes that there are 'compelling reasons' for doing so, to amend legislation, by order, so as to remove the incompatibility. It has been said that 'Reverence for the sovereignty of Parliament was the motive behind this remarkable amalgam of judicial and executive powers'.[78] The remedial order is a discretionary power. In the absence of a remedial order, any incompatible provision remains valid and effective under domestic law.[79] This emphatically reinforces the sovereignty of Parliament in respect of the making and unmaking of legislation.

If the Minister amends the primary legislation and the amendment fails to comply with Convention obligations, it is possible that a Court would strike down the amendment. A Ministerial amendment will only have the status of subordinate legislation, which is not protected as is primary legislation from a finding of invalidity by a court. This possibility of judicial review may act as a disincentive for a Minister to make a remedial order.[80]

4. Minister's Statement

19(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—

(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ('a statement of compatibility'); or

(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

As s 19 states that a Minister 'must' make a statement as to the compatibility of a Bill with Convention rights, it has been suggested that it implies a manner and form restriction such that a law cannot be properly made unless it is accompanied by such a statement. Hence, s 19 may establish a mandatory and judicially enforceable obligation.[81] This argument relies on the weak form view of parliamentary sovereignty discussed above, 'which maintains that it is possible to impose constraints, enforceable by the courts, on the "manner and form" in which Parliament's legislative power can be exercised'.[82] As yet there has not been a case in which a s 19 statement has not been made and in which a court has been asked to determine whether a law without such an accompanying statement is in fact a valid law.

The implications of s 19 for the sovereignty of the United Kingdom Parliament are unclear. Of course, it is clear that Parliament could itself repeal s 19 (subject only perhaps to the need to include a s 19 statement with such a repeal). Manner and form constraints upon parliamentary power have been accepted in decisions such as *Ranasinghe* and *Attorney-General (NSW) v Trethowan.* However, it has also been argued that manner and

78 Note 16 at 530.

79 HRA s 4(6)(a).

80 Higher courts have the capacity to strike down subordinate legislation, such as rules and regulations, if they are found to be incompatible. This is possible under s 3 of the HRA only if the governing primary legislation does not prevent removal of the incompatibility. See Note 34 at 4.

81 See Note 77 at 575.

82 See Note 77 at 575.

form limitations do not apply to the United Kingdom Parliament.[83] In *Ellen Street Estates v Minister of Health* it was held that 'constraints going to [either] substantive content or manner and form enactment of legislation are impermissible'.[84] This, however, might not be seen as a substantive limitation but merely as a procedural requirement that must be satisfied in order to enact a valid law. The resolution of this issue may reveal much about how judges view parliamentary sovereignty in the United Kingdom and the extent to which they are prepared to recognise that it exists only in a weak, qualified form and not in the strong, absolute form proposed by Dicey.

5. The doctrine of implied repeal

A hallmark of parliamentary sovereignty is the doctrine of implied repeal, under which in the event of inconsistency between two Acts, the later Act will be held to override the earlier Act. Implied repeal has been said to be a 'corollary of the untrammelled sovereignty of Parliament' because it recognises the power of a subsequent Parliament to override anything done by one of its predecessors.[85] The doctrine has long been recognised by English courts and in Australia.

The HRA modifies this understanding of parliamentary sovereignty as it is an Act with 'continuing effect'. It will not be repealed by a subsequent Act that is merely impliedly inconsistent with it. The continuing effect of the HRA has a precedent in both the *European Communities Act 1972* (UK) and the *Interpretation Act 1978* (UK).[86] Arguments have been put forward to defend the consistency of this aspect of the HRA with parliamentary sovereignty. One argument is that the HRA does not operate to repeal or impliedly repeal any Act because the Convention rights do not subsist in domestic law.[87] In response to questioning during the debate on the Human Rights Bill, the Lord Chancellor explained that the rights empowered under the Convention do not supersede earlier or later legislation but rather the interpretive obligation of section 3 provides guidelines for the court when interpreting legislation.[88] The argument was that the breach of Convention rights lies in the breach of the duty of public authorities to observe Convention rights as opposed to Convention rights being a part of the domestic law.[89] Nicholas Bamforth has also argued that the HRA 'protects Convention rights . . . only in so far as any apparent divergence from domestic legislation can be resolved by interpretation'.[90] Hence, 'Where any divergence is resolved by interpretation, we remain inside section 3 and there is no question of implied repeal', and thus where a declaration of incompatibility is issued, 'we are outside the ambit of protection' which section 3 affords Convention rights 'in the first place'.[91] Accordingly, the modification the HRA makes to the doctrine of implied repeal is not so substantial as to represent an encroachment on parliamentary sovereignty.

83 Note 77 at 575–582. See also Wade H, 'The Basis of Legal Sovereignty' [1955] *Cambridge Law Journal* 172 at 182.

84 [1934] 1 KB 590.

85 Note 39 at 64.

86 See also *Winnipeg School Division No 1 v Craton* [1985] 2 SCR 150 at 156 per McIntyre J ('Human rights legislation is of a special nature and declares public policy regarding matters of general concern. I[t] is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.'). See generally Williams G, *Human Rights under the Australian Constitution*, Oxford University Press, Melbourne, 1999 at 14–15.

87 See Note 77 at 574 on the discussion of the Lord Chancellor's arguments during the House of Lords Report Stage.

88 See Note 77 at 574. See also United Kingdom, House of Lords, *Parliamentary Debates*, November 19 1997 at 508–10, 521–2.

89 See Note 77 at 574.

90 Note 77 at 575.

91 Note 77 at 575.

V. Parliamentary sovereignty and an Australian Bill of Rights

In Australia, there are two possible methods of entrenchment of basic rights. The first possibility is an ordinary Act of Parliament, like the United Kingdom's HRA.[92] Just as the HRA involved incorporation of the ECHR into domestic law, Australia could similarly incorporate aspects of those United Nations human rights treaties that it has ratified. The International Covenant on Civil and Political Rights (ICCPR), perhaps in combination with the International Covenant on Economic, Social and Cultural Rights, could serve this purpose (both Covenants entered into force internationally in 1976 and were ratified by Australia in 1980 and 1976, respectively). This has been the New Zealand approach. The *New Zealand Bill of Rights Act* 1990 is an ordinary enactment, which recognises in its preamble as a central purpose: 'To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights'.

State Parliaments could enact a statutory Bill of Rights under their plenary legislative power, while the federal Parliament could do so by applying its power to legislate with respect to 'external affairs' in s 51(xxix) of the Constitution.[93] A State or federal statutory Bill of Rights could be protected against implied repeal as is the HRA. It could further be entrenched by using the model provided by the *Canadian Bill of Rights* 1960. Section 2 of that Act provides that laws passed by the Canadian Parliament should, 'unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*', be construed and applied so as not to abrogate any of the rights listed in the *Canadian Bill of Rights*. In *R v Drybones*[94] the Supreme Court of Canada considered the effect of s 2. It was held that s 2 was effective in rendering 'inoperative' federal legislation inconsistent with any of the rights listed in the *Canadian Bill of Rights*.[95] Of course, nothing prevents the Canadian Parliament from repealing the *Canadian Bill of Rights* so long as it does so in accordance with s 2.

As with the HRA in the United Kingdom, this statutory approach is consistent with traditions of parliamentary sovereignty as any Act could be overridden or repealed through express subsequent legislation. However, for some rights advocates this method is problematic because it means that basic rights remain subject to abrogation by Parliament. This leads to the second method of protecting basic rights: constitutional entrenchment. This would present a politically difficult task as it would require amendment of the Australian Constitution by referendum. Under section 128 of the Constitution, an amendment to the Constitution must be (1) passed by an absolute majority of both Houses of the Federal Parliament, or by one House twice; and (2) at a referendum, passed by a majority of the people as a whole, and by a majority of the people in a majority of the states. This process has been invoked 44 times, with only eight proposals succeeding at a referendum.[96] In this light, the HRA statutory model provides a possible incremental approach to the incorporation of rights in Australian domestic law. Any constitutional entrenchment might be considered after a statutory Bill of Rights has created a culture of rights within the community similar to what is occurring in the UK. This incremental approach was followed successfully in Canada with the passage of the *Canadian Bill of*

92 See Williams G, *A Bill of Rights for Australia*, UNSW Press, Sydney, 1999.

93 In *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 and in subsequent decisions such as *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, the High Court held that this power enables the federal Parliament to pass legislation to implement obligations that it has incurred by becoming a party to international instruments such as treaties and covenants.

94 [1970] SCR 282.

95 Note 94 at 294. See note 86 at 265–269.

96 See Blackshield T & Williams G, *Australian Constitutional Law and Theory*, 3rd ed, Federation Press, Annandale, NSW, 2002, at 1303–1308.

Rights, an ordinary Act of Parliament, before the amendment of its Constitution by the Canadian Charter of Rights and Freedoms in 1982.

The shortcomings of the common law system in Australia, particularly its vulnerability to legislation that expressly breaches civil liberties, are significant in the push for an Australian Bill of Rights. It has often been said that Australia's Constitution fails to adequately constitute the relationship between the government and the Australian people.[97] The Constitution contains few express rights that Australians may maintain against the exercise of governmental power.[98] They include section 116, which denies the Commonwealth Parliament, (but not the states) the power to legislate against the establishment of religion, against imposing religious observance or prohibiting free exercise of religion. Section 117 protects residents of states from any disability or discrimination based on state residency. Section 80 deals with trial by jury for any indictable offence against the law of the Commonwealth. The High Court has also interpreted the Constitution to contain implied freedoms such as that of political communication.[99] However, such implications have lead to much debate and controversy, including on the proper limits of judicial activism.[100]

Of similar concern is the ease in which the Australian parliaments are able to override legislation that protects basic rights, such as the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth). This is exemplified by the controversy regarding the *Native Title Amendment Act 1998* (Cth), which qualified the protection available under the *Racial Discrimination Act*. While subsection 7(1) of the *Native Title Amendment Act* states 'this Act is intended to be read and construed subject to the provisions of the *Racial Discrimination Act*', subsection (2) provides that the *Racial Discrimination Act* has no operation if the intention to override native title is unambiguous. The possibility of amendment or repeal of legislation such as the *Racial Discrimination Act* was the subject of a report in 2000 by the United Nations Committee on the Elimination of Racial Discrimination. In its concluding observations on Australia, it stated: 'The Committee is concerned over the absence from Australian law of any entrenched guarantee against racial discrimination that would override subsequent law of the Commonwealth, states and territories.'[101]

The lack of protection provided to fundamental rights in Australia suggests that Australia's stoic adherence to the common law tradition and faith in the good sense of our parliamentarians as providing the best protection for human rights is now misplaced. Indeed, the capacity of the largely unfettered exercise of executive and legislative power to infringe upon human rights was a catalyst for the announcement on 3 April 2002 of a Bill of Rights Inquiry in the Australian Capital Territory. It was preceded by an inquiry by the Standing Committee on Law and Justice of the New South Wales Parliament, which reported in October 2001. That committee found that the common law does not provide 'sufficient protection of individual rights in the absence of legislative action'.[102] It recognised that New South Wales governments have failed to address at times systemic problems relating to the human rights of individuals and minority groups.[103] The

97 Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights*, UNSW Press, Sydney, 2000, at 17.

98 Note 86 at 47–48, 96–154.

99 Note 86 at 155-266.

100 Stone A, 'The Australian Free Speech Experiment and Scepticism about the UK Human Rights Act' in Note 62 at 391.

101 *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia* 19/04/2000 CERD/C/304/Add.101 at para. 6.

102 NSW Legislative Council, *A NSW Bill of Rights*, Standing Committee on Law and Justice Report 17, Sydney, NSW Legislative Council, October, 2001, at 110, para. 7.3.

103 Note 102.

Committee also found that legislation in New South Wales is prepared within departments without any measurement against human rights standards and is often passed without any discussion of such standards.[104] Despite such findings, the Committee concluded that the New South Wales Parliament remains the best protector of human rights and that a Bill of Rights was not in the public interest. This conclusion reflected the strongly held view of the Premier of New South Wales, Robert Carr, that a Bill of Rights would undermine parliamentary sovereignty as 'It would see a shift in decision-making from the Parliament, the elected representatives of the people, toward the judiciary'.[105] It had been well documented in the media that the Premier was an ardent opponent of a Bill of Rights in any form.[106] In his submission to the inquiry, he argued that 'the protection of rights lies in the good sense, tolerance and fairness of the community'.[107]

The fact that an inquiry like that in New South Wales could identify major deficiencies in the common law, but still recommend against a Bill of Rights, shows that the attachment to parliamentary sovereignty in Australia remains a powerful one. There is a strong and continuing link between this view today and its expression in the constitutional conventions of the 1890s and in the writings of Dicey.[108] Sir Owen Dixon, a former Chief Justice of the High Court, remarked that the framers asked rhetorically why 'should doubt be thrown on the wisdom and safety of entrusting to the chosen representatives of the people . . . all legislative power, substantially without fetter or restriction?'[109]

In this context, the enactment of the HRA presents an important challenge. Australia has inherited much of its legal and political system from its 'constitutional parent'. Indeed, some Australians have resisted a Bill of Rights because of a desire to adhere to the familiar pre-1998 United Kingdom model of Westminster constitutionalism. A key feature of that system was a high (almost unchallengeable) regard for parliamentary sovereignty. Another feature was the notion that courts do not have a significant role to play in assessing parliamentary action against basic standards of human rights. Significantly, neither concept could ever be faithfully applied in Australia given the High Court's role of exercising judicial review of legislative action.

Australian legislatures are subject to judicial review and have had their legislation (not infrequently) declared invalid where it breaches the Constitution. While Dicey's theoretical approach supports the right of Parliament to make or unmake law with no body or person having the capacity to override or set aside legislation, this is heavily qualified by the federal and State Constitutions. The decision of the High Court in the *Communist Party Case*[110] is the most significant decision in which the High Court has declared its role in this regard. That decision established, in the language of Fullagar J, that in the Australian system the notion of judicial review of legislation 'is accepted as axiomatic'.[111]

If Australia were to implement a Bill of Rights in a form like the HRA it would not result in a dramatic realignment of judicial and legislative power. A Bill of Rights in this form would not prevent, as a matter of law, the enactment of legislation that infringes basic rights. It would not usurp the policy-making role of the Parliament. Any constraints

104 Note 102 at 115, para. 8.1.

105 'NSW decides against Bill of Rights' *The Age*, 3 October, 2001; Morris R, 'Two-year inquiry rejects rights bill', *Daily Telegraph*, 3 October, 2001.

106 'Carr kills off any hopes for Bill of Rights' *Sydney Morning Herald*, 25 November, 1999 at 9; *Radio National*, AM program, 'Calls for Australian Bill of Rights rejected', 576 AM, Sydney, 8 January, 2001 >http://www.abc.net.au/am/s231069.htm<; Carr R, 'How a Bill of Rights Lays a Trap', *Canberra Times*, 20 August, 2001 at 9.

107 Note 102 at 78.

108 Patapan H, 'The Dead Hands of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia' (1997) 25 *Federal Law Review* 211 at 217–219.

109 Dixon O, *Jesting Pilate*, The Law Book Co., Sydney, 1965 at 102.

110 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

111 Note 110 at 262.

would be primarily political rather than legal. A statutory Bill of Rights like the HRA might cause Parliaments and governments to reassess their approach in areas such as mandatory sentencing, refugee detention and even legislation directed at terrorism. It could create a much-needed culture of human rights dialogue at the parliamentary level and embed human rights principles more firmly into Australian legal culture. However, in a system where parliamentary sovereignty is already heavily modified by a written constitution and where parliamentary sovereignty has never existed in its strong form, an Australian version of the HRA Act would not pose any fundamental challenge to the Australian parliaments.

VI. A Human Rights Act for Australia?

Unlike in the United Kingdom, Australians do not have recourse to an antipodean European Convention on Human Rights or to a court with a like jurisdiction. However, Australians do have access to certain United Nations dispute resolution processes. Because of the inadequate protection of even the most fundamental civil and political rights at domestic law, Australian citizens are increasingly turning to international law and United Nations treaties to seek vindication of their rights. In fact, Australia is fast approaching a situation resembling pre-HRA United Kingdom where the resolution of domestic human rights matters in the international forum exposed the need for a domestic scheme of rights protection. In addition, in Australia, judges have incorporated international law principles into domestic law through the development of the common law and statutory interpretation, and in some cases through constitutional interpretation.[112]

Australia has a growing record of communications to the United Nations human rights treaty bodies of allegations about domestic human rights violations. This reflects the absence of any domestic remedy or process for many of these matters. One important international mechanism is the (First) Optional Protocol of the International Covenant of Civil and Political Rights, which came into force in Australia in 1991. Under Article 5(2)(b) of the Optional Protocol, anyone within Australian jurisdiction may, after they have 'exhausted all available domestic remedies', make a complaint to the Human Rights Committee that their rights under the Covenant have been breached. Recourse is also available to the Convention on the Elimination of all Forms of Racial Discrimination (CERD), which came into force in 1975. Under Article 14, the Committee on the Elimination of Racial Discrimination may receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by Australia. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishment (CAT) came into force in 1989. Under Article 22, the Committee Against Torture may receive and consider communications from or on behalf of individuals who claim to be victim of a violation by Australia of the CAT.

By May 2001, 57 complaints had been made against Australia under the ICCPR, CAT and CERD.[113] One of the more public outcomes was a 1993 case regarding a detainee at the Port Hedland detention centre. That communication was brought under Articles 9 and 14 of the ICCPR.[114] The Committee found that there had been a breach of the right in Article 9 not to be arbitrarily detained. An important example of Australian law being altered because of decisions made under such instruments occurred after Nicholas Toonen, an activist for homosexual rights in Tasmania, complained to the Human Rights Committee

112 See Simpson A & Williams G, 'International Law and Constitutional Interpretation' (2000) 11 *Public Law Review* 205 and compare the strong statement to the contrary by Callinan J in *Western Australia v Ward* [2002] HCA 28 (8 August 2002) at para 954–963.

113 Note 97 at 61.

114 ICCPR Communication 560/1993.

that his rights were infringed by the now repealed[115] ss 122 and 123 of the *Criminal Code Act 1924* (Tas). Section 122 of 'Chapter XIV — Crimes Against Morality' of the Code made homosexual sexual activity between consenting adult males a crime. It established an offence, punishable by jail, of having 'carnal knowledge of any person against the order of nature'. The Committee upheld Toonen's claim that the law was inconsistent with the right of privacy set out in Article 17 of the ICCPR.[116] The Commonwealth responded by passing the *Human Rights (Sexual Conduct) Act 1994* (Cth). Section 4(1) of that Act provides:

> Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.

This provision was clearly designed to override, by way of s 109 of the Constitution, the *Criminal Code Act*.

Similarly, in 1998 Mr Elmi, a Somali man subject to a deportation order, complained under the CAT procedure arguing that he feared he would be tortured on his return to Somalia[117]. Following this communication, Australia reconsidered the deportation order. Of course, such UN decisions are frequently not responded to domestically, except in the form of rejection and criticism. Perhaps the most recent controversial reaction to such decisions occurred in the context of CERD findings that amendments to the *Native Title Act 1993* (Cth) were incompatible with Australia's treaty obligations under the convention.[118] There has been no legislative response to this finding.

Such cases demonstrate the increasing recourse had by Australians to international forums in regard to domestic grievances and provide a parallel to the pre-HRA situation where United Kingdom citizens had recourse to the European Court of Human Rights for domestic violations of basic civil and political rights. Like Australia, the United Kingdom suffered the perceived indignity of negative comments from a supranational judicial institution that reflected the inadequacy of the nation's own common law system and its inability to protect the rights of its citizens. Australia is now developing a consistent and public record within the United Nations system for its human rights violations. While the United Nations human rights system delivers non-binding advisory comments as opposed to binding judicial deliberations, the categorical condemnations of the weak protection of basic rights in Australia give rise to questions about the capacity of our common law system to deal with such grievances.

VII. Conclusion

The fact that the United Kingdom, the source of our own common law traditions, has chosen to modify many of those traditions through the introduction of a Bill of Rights does not mean that Australia too must do so. Yet, faced with overwhelming evidence of the lack of adequate rights protection in Australia, it is clearly something our Parliaments should consider. What is significant is that the United Kingdom has achieved such change without undermining carefully constructed understandings of parliamentary sovereignty. The HRA statutory model balances new judicial functions against the established and accepted role of Parliament to provide political leadership and to drive policy formulation. Once it is recognised that parliamentary sovereignty does not exist in any absolute form, legislation such as the HRA can be seen as an appropriate accommodation of such

115 *Criminal Code Amendment Act* 1997 (Tas), ss 4, 5.
116 Human Rights Committee, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992, 4 April, 1994.
117 CAT Communication 120/1998.
118 Committee's Concluding Observations, United Nations Doc CERD/C/304/Add 101, 19 April, 2000.

sovereignty to the better protection of human rights and to meet better a nation's international obligations.

It is a promising sign that the United Kingdom judiciary has so far embraced its limited role within this new scheme. This is illustrated by judges reading and giving effect to legislation in a way that is compatible with Convention rights rather than through any process of judicial review. This experience should play an important role in public debate about a Bill of Rights in Australia, and should shift attention from the more litigious United States Bill of Rights. Historically, campaigns for legal reform in Australia have been often defeated because of misinformation about our legal and political structures and even by a belief that if Australia were to have a Bill of Rights it would closely resemble that the United States model. Australia should take account of recent reforms in the United Kingdom. With increasing community awareness of human rights issues and concerns, now is the time to re-examine our political and legal structures. The HRA shows us a path forward.